**Act and Omission in Criminal Law: An Ethical Perspective**

The book discusses the distinction between an act and an omission in criminal law, an important distinction, that serves as a guiding principle in all categories of offenses. The distinction implies, that when seeking to convict a defendant for an act that caused harm, any act that caused the prohibited outcome will suffice for the purposes of a conviction. On the other hand, when seeking to convict a defendant for an omission that caused the very same harm, the defendant will be convicted only if he was under a duty to act, and the breach of said duty caused the proscribed harm.

The distinction between act and omission does not only exist in the domain of criminal law, and is well rooted in our moral thinking as well. Thus, the moral responsibility of a person who caused the death of another by an act, is considered to be significantly greater than the moral responsibility of a person who “only” did nothing to prevent the death. This distinction is, in the opinion of many, the moral basis for the difference between active euthanasia, which is forbidden in most countries, and passive euthanasia, that is permitted in many countries under certain circumstances.

This distinction, which appears reasonable and intuitive to the moral and legal mind, is not easy to substantiate; Indeed, from the early 1960s onwards, a significant trend emerged, attacking and criticising this moral distinction. The critics argued, that when the intent and outcome in both instances are the same, there is no moral difference between act and omission. This was undoubtedly a morally revolutionary viewpoint, which contradicts our intuition. According to it, ostensibly, our legal thinking should also change, since if the moral distinction is questionable, the legal distinction is also not self-evident.

The book fully and coherently connects, for the first time, the philosophical-moral debate with the legal-criminal debate, in relation to the distinction between act and omission. In this context, the book offers an important division between approaches that have founded the distinction between act and omission in criminal law on a moral rationale, and approaches that based the distinction on a legal one. After critical discussion of these rationales, the book presents a new rationale for distinguishing an act from an omission in criminal law. In the second part, the book will discuss practical and important questions related to the distinction, such as: What are the definitions of an act and an omission in criminal law? Is it proper to draw a distinction between act and omission when it comes to sentencing? What is the position taken by the courts in the United States in relation to this distinction? And is the distinction between active euthanasia and passive euthanasia necessarily related to the distinction between an act and an omission in criminal law?

The Hebrew version of the book was published in 2015 by *Nevo*, considered to be one of the most reputable and influential publishers amongst judges and lawyers in Israel. The book was also quoted in articles and books published in Israel, and formed the basis for a number of important precedents enunciated by the Israeli Supreme Court.

**I believe the book is highly suitable to Routledge’s Law, Ethics, and Economics series; as I mentioned above, it thoroughly connects two research fields – criminal law and the philosophy of morality.**

**The Book’s Purpose**

The book’s purpose is to discuss, fully and in detail, one of the most important distinctions in our moral and legal thinking, the distinction between act and omission. Whereas articles written on the subject matter have separated the philosophical-moral debate from the criminal-legal one, this book connects these two scholarly fields in a profound and enriching way. In addition, the literature to date in relation to the distinction between act and omission, was concerned with certain aspects of the distinction; however, this book is concerned with the distinction as a whole, in all its legal and moral aspects.

The book is comprised of a theoretical part, to be found in the First Title, and a more practical part, to be found in the Second Title; one of the book’s main aims, is to show that the practical questions clearly rely on the theoretical aspects dealing with the various rationales that distinguish between act and omission in criminal law.

The book begins by presenting the sceptical approaches that have challenged the distinction between act and omission from a moral perspective, and proceeds to critically discuss approaches that have attempted to substantiate the distinction between act and omission in criminal law. In the setting of this discussion, the book proposes a division into two types of rationales that have been proposed for the distinction between act and omission in criminal law: Moral rationales and legal rationales. The division between moral and legal rationales is innovative, and directly affects a wide range of practical questions related to the distinction in criminal law, which will be discussed in the book’s Second Title. Exposing the rationales, analysing them, and noting the differences between them, has the potential to create a new and more complete picture in relation to the way we think about the distinction between an act and an omission in criminal law. Beyond this innovative division, the book proposes a new rationale for distinguishing act from omission in criminal law, focusing on the distinction between ‘killing’ and ‘letting die.’ The new rationale demonstrates, that contrary to intuition, the moral prohibition on killing protects broader values ​​than the moral prohibition on letting die, and this is the basis for the distinction between killing and letting die in criminal law.

In contrast to contemporary literature that deals with the distinction between act and omission, the book is aimed at researchers, lawyers, and judges in the field of criminal law, and there is no doubt in my mind, that the book will assist them in acquiring an extensive and wide-ranging outlook on the subject matter.

The book will also be of interest to scholars from the field of the philosophy of morality, as well as to bioethicists who grapple with the distinction between active and passive euthanasia.

**The Book’s Chapter Headings**

**Introduction**

The introduction reviews the book as a whole from a bird’s eye viewpoint. It points out that the distinction between act and omission is a distinction ingrained in both criminal law and customary morality, which gives weight not only to the consequential aspect of conduct, but also to the manner in which it occurs. Despite this intuitive thinking, from the early 1960s to the present day, there a significant trend has emerged in philosophical literature that criticises the distinction, to the point that it can be said that nowadays the philosophy of morality is divided on whether there is indeed a moral distinction between act and omission, or whether said distinction is devoid of real substance. Although the philosophy of morality is divided on the question of the aforementioned distinction, surprisingly, the controversy never entered the realm of criminal law. However, one must ask, if indeed the moral distinction is itself in question, does that not result in the legal distinction losing its self-evident status?

In view of this fact, it is emphasised, that the purpose of the book is to answer several principal questions:

(1) What is the rationale distinguishing act from omission in criminal law? In this context, we will clarify the reasons why a person will be convicted for an omission only if a duty to act is incumbent on him, whereas in the case of an act, the same cannot be said. (2) What is the definition of an act and an omission in criminal law, and what is the position of the courts in the United States on the point? (3) Which duties satisfy the demand of an obligation to act in the event of an omission? Will every enactment imposing a duty to act satisfy the requirement of an obligation, or will only specific duties serve for said demand? (4) Should there be a difference in sentencing between an act that caused harm, and an omission that caused the same harm, even when a duty to act was violated? (5) Is the distinction between active and passive euthanasia related to the distinction between a criminal act and omission?

One of the aims of the book, is to demonstrate the deep rooted connection that exists between the question of rationale, and the distinction between act and omission in criminal law to the practical questions presented above.

The introduction emphasises that from the analysis of the legal and philosophical literature it is possible to divide the rationales proposed for the distinction between act and omission in criminal law into two types: Legal rationales and moral rationales. The legal rationale, is that the need to establish a duty to act in the event of an omission, in contrast to the event of an act, in fact stems from a problem related to the principle of legality, a desire to solve a problem of coordination between citizens, and the need to reduce the number of potential culprits. The moral rationales, each emphasise separately a different vertex of the relevant triangle: The potential defendant, the causal link between the defendant’s behaviour and the prohibited harm, and the harm inflicted on the victim. Thus, the freedom rationale focuses on the “actor” vertex of the triangle, and specifically, on the different infringement of the “actor’s” freedom in the event of a prohibition related to an act, *vis-à-vis* a prohibition related to an omission. On the other hand, the causal rationale focuses on the vertex of the causal link between the defendant’s behaviour and the harm done to the victim. Finally, the third rationale, emphasises the damage to the third vertex of the triangle: The victim himself.

After concluding the review of the various rationales, the introduction briefly presents the theory I proffer, that the distinction between act and omission in criminal law lies in the differing infringement of individual autonomy with respect to homicide by act, as compared with homicide by omission.

**The First Title**

**Chapter A – Comparative Sceptical Theory**

In this chapter, I will discuss sceptical theory, which holds that there is no moral distinction at all between an act and an omission in general, and between ‘killing’ and ‘letting die,’ in particular. According to this theory, when all circumstances are equal – the intentions, motives, consequences, and costs to prevent the harm – there is no difference between an act that caused the harm, and an omission that caused the very same harm. It should be noted, that sceptical arguments that criticised the moral distinction between act and omission are not uniform, and in this chapter I will present the distinctions between them. At the conclusion of each approach, I will present possible criticism of it.

**1. Case Comparison Argument**

In this section, I will present the preliminary position refuting the existence of a moral distinction between act and omission. The methodology of this position, focuses on presenting two cases that are equal in every aspect, except in the fact that in one case the harm was caused as a result of an act, while in the other, the harm was caused as a result of an omission.

**2. The Argument Comparing the Reasons for the Prohibition**

In contrast to the first approach which sought to negate the moral distinction by comparing two cases, the second approach, developed by James Rachels, focuses on analysing the rationale underlying the prohibitions against ‘killing’ and ‘letting die.’ This approach attempts to negate the moral distinction not on the strength of judicial intuition comparing two cases, but on rational argument proving that there can be no moral distinction between the two instances at all.

**3. The Argument Attacking the Moral Rationale**

In contrast to the two previous approaches, which attempted to posit positive arguments in favour of denying the moral distinction, the present approach seeks to deny the moral distinction by rejecting the various rationales posited for the distinction between act and omission in the first place.

**4. The Argument Attacking the Definition**

The fourth and final approach relates to scholars who defined the concepts of ‘killing’ and ‘letting die,’ but argued that in view of this definition, there is no moral rationale for distinguishing an act from an omission in general, or ‘killing’ from ‘letting die,’ in particular.

**Chapter B – The Moral Rationales Distinguishing Act from Omission in Criminal Law**

In this chapter, I will discuss the approaches that posit that there is a distinction between act and omission, and that this distinction rests on a moral rationale. According to these approaches, the reason a **legal** distinction must be drawn between act and omission, stems from the **moral** distinction between the two. In this regard, I will note, that when I refer to moral rationales, I mean rationales that indicate a distinction related to the level of guilt attributed to the accused in the case of causing harm by an act, as opposed to his guilt in the case of causing harm by omission. In presenting the rationales, I will note the definitions of act and omission arising from the relevant rationale. At the conclusion of the presentation of each theory, I will critique it.

1. **The Rationale of Causation**

This section will present one of the most morally intuitive rationales for distinguishing an act from an omission in criminal law. This rationale is based on a causal distinction between an act that caused harm, and an omission that resulted in the same harm. According to this distinction, homicide by act, for example, is more serious than failing to prevent a death, since in homicide by act, there is a causal link between the defendant’s actions and the victim’s death, whereas in the case of an omission, expressed as a failure to prevent a death, there is no causal link, or at least, if there is a causal link between the accused’s conduct and the victim’s death, it is indirect. In the setting of this section, I will present a number of theories about causality that may support the position that there is a distinction between an act and an omission in general, and between ‘killing’ and ‘letting die,’ in particular.

1. **The Rationale of Liberty**

This section will present one of the central customary theories for distinguishing act from omission in criminal law. This focuses on the varied infringement of a citizen’s freedom of action. According to this approach, in the case of the prohibition against homicide by act, the harm to the citizen’s liberty is not so great, since all that is required of the citizen to do, is to refrain from a particular act, but this does not prevent him from performing an infinite number of other acts. On the other hand, a prohibition against omission, permits him to do one deed, but prevents him from doing an infinite number of others. Thus, a prohibition against ‘killing,’ prohibits him from taking specific action, but allows him to do an infinite number of others. On the other hand, a general prohibition against ‘letting die,’ without a specific duty to act, would significantly impair the citizen’s freedom of action, since such a prohibition would oblige him at all times to perform rescue operations, since at any given moment, somewhere, there is a person in danger. Requiring the citizen to perform rescue operations at all times, would deprive him of the opportunity to plan and manage his life in a reasonable manner.

1. **The Rationale of Harm to the Victim**

In this section, I will present the rationale which does not focus on the differing harm to the citizen’s freedom of action, or on the difference in nature of the causal link between the defendant’s conduct and the prohibited harm, but on the differing harm to the victim himself. According to this approach, in all cases of ‘letting die,’ the victim “only” loses a life he could have had in consequence of the defendant providing assistance. In contrast, in the majority of instances of killing, the victim loses a life he could have had independently of the defendant. Another approach focuses on the dissimilar harm to the victim, is that in the case of ‘killing,’ the defendant makes the victim’s circumstances worse, whereas in the case of ‘letting die,’ it is true that he does not benefit him, but he also does not make his condition worse.

**Chapter C – The Legal Rationales that Distinguish an Act from an Omission in Criminal Law**

In this chapter, I will present the approaches that posit that the distinction between an act and an omission in criminal law is not founded on a moral rationale, but on a legal one. According to this claim, I will argue, that even if there is no moral distinction between an act that caused harm, and an omission that caused the same harm, it is still appropriate for criminal law to draw such a distinction due to internal legal reasoning.

1. **The Rationale Based on the Principle of Legality**

In this section, I will present the position that the distinction between an act and an omission in criminal law lies in the principle of legality. According to this approach, since causality is rooted in deviating from the normal and reasonable in any given occurrence, both an act and an omission can cause harm; An omission, like an act, may also constitute a deviation from the normal and reasonable in a given situation, and in such case, it will be the cause of the harm. However, although there is no substantial causal distinction between an act and an omission, there is still a need to find a duty to act in the event of an omission, in order for the citizen to know in a given situation that there is indeed a deviation from the normal and reasonable. Without denoting a duty to act in the event of an omission, the citizen will not know whether his omissive behaviour was the cause of the harm or not. This distinction therefore does not derive from a moral distinction, but from a legal distinction based on the principle of legality.

1. **The Coordination Problem Rationale**

In this section, I will present the position that the need to find a duty to act in the event of an omission in contrast to the event of an act, stems from the need to solve the problem of coordination between citizens. Accordingly, absent a need to discern a duty to act in the event of an omission, a tremendous waste of resources would result, as many citizens would have to help people in need, without any real necessity. The specific duty to act solves this problem, since in any given instance, only specific people will have to provide aid, and the rest of society will be able go about its business.

1. **Reducing the Culprits Rationale**

In this section, I will present the position that the need to find a duty to act in the event of an omission stems from the difficulty of discovering the primary culprit in the event of an omission. The duty to act imposed on a specific type of person solves this problem.

**Chapter D – The Theory of Individual Autonomy Infringement**

In this chapter, I will present the new rationale I am proposing for distinguishing an act from an omission, focusing on the distinction between ‘killing’ and ‘letting die.’ In this context, I would argue, the crucial element for the purposes of the distinction lies in understanding which interests the two prohibitions – the prohibition on killing, and the prohibition on letting die – seek to protect. It appears, that the starting point of all the previous theories suggested, was that the two prohibitions seek to protect the same interests or values ​​– the victim’s life. As compared with these approaches, in this chapter, I will argue, that the interests underlying the prohibition on killing are wider and deeper than the interests underlying the prohibition on letting die. The proscription against killing establishes our personal autonomy, as individuals and as a society, in that it allows us to live a life of security, absent defensiveness or fear. On the other hand, the prohibition against letting die, does not establish our autonomy, rather, in a mere small number of instances, it extends it.

Methodologically, I would argue that the distinction between act and omission in general, and between killing and letting die in particular, must be proved in a different way from the manner in which many authors have approached the subject. I am not attempting to examine two discrete instances of killing and letting die, and thereby deduce why the prohibition on killing is graver. On the contrary. I am attempting to examine what underlies the prohibitions on killing and letting die, and in this way I examine why the prohibition on killing is graver. In other words, I argue, that the severity of the prohibition should not be deduced from a particular case, but should be deduced from the interests and values ​​that underlie the prohibitions.

To understand what underlies each prohibition, I would argue that two main questions should be asked:

1. What would happen in the world, if the ban on killing had not existed at all?

2. What would happen in the world, had there been a ban on killing, but no ban on letting die?

My contention is that the answers to these two questions will demonstrate how the situation would be different without the relevant prohibitions. In other words, the two questions will clarify for our benefit what exactly each one of these prohibitions protects.

With regard to the first question, I will demonstrate, that without the prohibition against killing, one may suspect that we would fall into a life of defensiveness and fear of various injuries, that could even result in our death. Under such circumstances, even if people were able to protect their very lives, they would still be living in constant fear and threat of death. This fear would lead to a significant impairment of individual autonomy, since in such circumstances, it would be difficult for one to realise one’s aspirations and plan one’s life in a reasonable fashion. On the other hand, with regard to the second question, I will demonstrate, that had there been a ban on killing, but no ban on letting die, it is possible that we would not be living under optimal human conditions, but we would certainly not deteriorate into Hobbes’ ‘natural state’ – of all-out war. In such a situation, although a person would fear dangerous situations, he would not be living in constant fear of being killed.

From this argument it follows that the prohibition on killing seeks to protect the more fundamental interests of a person’s ability, and a society’s ability, to lead a reasonable life, than the prohibition against letting die. In this section, I will point out the differences between the theory I propose and the other rationales presented above.

In presenting the argument, I will demonstrate, that it is consistent with a moral theory of utilitarianism in general, as well as with the social covenant moral theory proffered by Hobbes and Rolls.

In this chapter, I will show how the theory I propose affects the definition of killing and letting die, and how it resolves the criticisms levelled at the other theories mentioned in the previous chapters.

**Title Two**

**Chapter E – Case Law’s Position Regarding the Definition of Act and Omission**

In this chapter, I will present the position enunciated by United States case law regarding the definitions of act and omission. As I will demonstrate, case law in the United States is not uniform; there are judgments that have subjected the definitions of act and omission to the principle of physical movement, whereas there are judgments that have not subjected the definitions of act and omission to said principle. According to the judgments that subjected the definitions of act and omission to the principle of physical movement, an act is a physical movement, whereas an omission is the absence of a physical movement, and in any case of a lack of physical movement (such as standing still), it would be necessary to point to a duty to act. On the other hand, according to the judgments that did not subject the definitions to the principle of physical movement, there may be cases involving physical movement that would be classified as an omission, and on the other hand, there may be cases that do not involve physical movement that would be classified as an act. At the end of the chapter, I will illuminate the root of the controversy between the judgments, with regard to the various rationales presented above.

**Chapter F – The Sources of A Duty to Act that Can Be Used as a Basis for Imposition of Criminal Liability in Omission Offenses**

In this chapter, I will discuss the question of what duties can provide the underlying infrastructure for imposing criminal liability in omission offenses. Can any lawful duty serve as a basis for a conviction in an omission offence, or is it only specific and unique duties that may serve as a basis for a conviction in an omission offence? In this context, I will present three approaches in relation to the question.

The **broader approach**, posits that any duty at law can serve as a basis for a conviction in an omission offense, whether it is a duty in criminal law, or a duty arising from civil law.

The **restrictive approach**, posits that only certain duties can serve as the source of a duty for the purposes of a conviction in omission offenses. According to this position, the specific duties should arise from the relationship between defendant and victim, or from the relationship between the defendant and the source of the danger, or by virtue of a specific office.

The **intermediate approach**, posits that only duties that have created a social expectation, can serve as a sufficient duty for the purposes of a conviction for omission offenses. On the other hand, duties that do not create such social expectations, cannot serve as the source of a duty to act, for the purposes of a conviction in an omission offense.

At the conclusion of presenting the various approaches, I will present the relationship between them and the rationales presented above.

**Chapter G – Sentencing Differences between Act and Omission**

In this chapter, I will discuss the question of whether there should be a distinction at the sentencing level between a case in which an act caused harm, and the case in which an omission caused the same harm, as a result of a breach of duty to act? Should a case in which a lifeguard refrains from providing assistance to a drowning person, be punished in the same way as ‘A’ who drowned ‘B’ by action, or should punishment be more lenient, because his behaviour was manifested in an omission, and not in an act. In this context, I will present a number of approaches to the question of sentencing, and link them to the division between moral rationales and legal rationales.

**Chapter H – The Distinction between Active and Passive Euthanasia and its Connection to the Distinction Between Act and Omission in Criminal Law**

In this chapter, I will present various positions on the question of whether a moral and legal distinction should be drawn between active and passive euthanasia. In this regard, I will present a complex position, according to which, even if we accept the moral and legal distinction between an act that caused harm, and an omission that caused the same harm, there is still no distinction between active and passive euthanasia, and if passive euthanasia is permitted, active euthanasia should also be permissible.

**Length & Schedule**

The estimated length of the book is about 120,000 words. I believe that once the proposal is approved, I can finish writing the book in approx. 9 months.

**Market**

The book is a legal monograph regarding the distinction between an act and an omission in criminal law. Thus, the book is primarily aimed at researchers in the field of criminal law, as well as judges and lawyers.

Moreover, the issue of the distinction between act and omission is taught in all law schools as part of the introductory course to criminal law; therefore, the book can act as an aid to lecturers presenting this course.

Over and above which, since the book connects two fields of study – the philosophy of morality and criminal law – the book is also relevant to scholars in the field of the philosophy of morality, as well as to bioethicists concerned with the issue of euthanasia.

**Competition**

KILLING AND LETTING DIE (SECOND EDITION) EDITED BY BONNIE STEINBOCK AND ALASTAIR NORCROSS (1994). This book includes articles written by various scholars on the moral distinction between killing and letting die. On the other hand, the book I wrote, deals entirely with the distinction between act and omission in criminal law, it connects discussion from the fields of the philosophy of morality and criminal law, and furthermore, it discusses in this context various practical issues occupying the courts on a daily basis.

MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993). The book discusses the philosophy of the act, and its implications for criminal law. In this regard, one part of the book discusses the distinction between act and omission in criminal law, primarily from the perspective of a causal distinction between an act and an omission.

Moreover, many articles have been written, both in criminal law and in the philosophy of morality, about the distinction between an act and an omission; Additionally, every criminal law textbook contains a chapter on omissions in criminal law. Yet no book has ever been written that focuses entirely on this distinction, fully presenting both the sceptical approaches that dispute the distinction between act and omission, and the legal and moral rationales for the distinction, while tying them to the practical questions that result therefrom.

**Biographical Summary**

Dr. Roni Rosenberg is a lecturer and researcher in the field of substantive criminal law, as well as in the jurisprudence of criminal law. He holds a Ph.D. from the Bar Ilan University (2010). In 2017 – 2019 he was a researcher at the Taubenschlag Institute of Criminal Law at the Tel Aviv University Faculty of Law. He has published more than 20 articles in leading journals in Israel and around the world in the field of criminal law. He articles have been cited in judgements rendered by the Israeli courts, including in important Supreme Court precedents.

Dr. Rosenberg was the editor-in-chief of the journal “Legal Research” [Hebrew – *Mekhkarei Mishpat*], which is the leading journal of the Bar Ilan University Faculty of Law (2008 – 2010).

Dr. Rosenberg served as an advisor to the *Knesset* Committee for the Advancement of Women on the issue of the amendment of the Prevention of Sexual Harassment Act, and participated in discussions at the *Knesset*’s Constitution, Law and Justice Committee, regarding the reform of homicide offences that passed in Israel in 2019.